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COMPUTATION OF THE PERIOD OF SUSPENSION UNDER AN INSTRUMENT IN EXECUTION OF A POWER.

By § 178 of the Real Property Law it is provided that "The period during which the absolute right of alienation may be suspended, by an instrument in execution of a power, must be computed, not from the date of such instrument, but from the time of the creation of the power." For the purpose, as would appear, of establishing some convenient specific formula for the actual applicaton of this statutory rule, the courts have frequently restated the terms of § 178 in other language, sometimes in one form, and sometimes in another.

Some of these statements adhere very closely, in substance, to the terms of the statute. Thus in *Hillen* v. *Iselin*[1] it is said that

"It is well settled that the time of the suspension of the power of alienation, where appointments of future estates have been made under a power, which are claimed to be invalid for remoteness, is to be measured from the death of the testator, or, in the case of deeds, from the time of the conveyance. For the purpose of determining whether there has been an unlawful suspension of the estates created under a power, they are considered as having been created when the will or deed took effect."

And in *Beardsley* v. *Hotchkiss*[2] it is said that

"We must go back to the date of the ante-nuptial contract [which created the power there in question] and see if, computing from that date, there has been an illegal suspension of the absolute power of alienation * * * "

But in other statements of the rule, a different formula has been laid down. This formula is, that the validity of a term of

[1](1895) 144 N. Y. 365, 378.
[2](1884) 96 N. Y. 201, 214.

suspension attempted by the provisions of an instrument in execution of a power, must be tested by reading those provisions into the instrument by which the power was created,[3] as if they had been actually incorporated therein at the time of its execution.[4]

Thus under both formulas the term of a suspension occasioned by the provisions of the later and subsidiary instrument, like the term of any suspension occasioned by the provisions of the earlier, is to be computed from the time of the creation of the power; and the difference between the two tests is found in the fact that while the first leaves the two instruments to be contemplated as still separate, though co-operating, when the power has in fact been exercised, to produce a total joint scheme of disposition, the second contemplates the provisions of the later instrument as if they had been originally incorporated bodily into the earlier, thus putting the case as if there were only one instrument to be considered, containing in itself a complete and final scheme of disposition matured and announced as an entity from the beginning.

As applied to most cases to which the statutory rule relates, this "reading-in" formula is undoubtedly correct, and the employment of it would lead to the same result as would the use of the statutory rule for measuring the period merely by computaton "from the time of the creation of the power." But it is believed that there is at least one class of cases where the use of the "reading-in" formula would lead to a different, and incorrect, result.

It is probably true that the foregoing statement of the difference between the two tests, attributes to the "reading-in" formula, as stated by the courts, a more literal meaning than it was intended to have. But that formula has in fact been set forth in such precise terms, and has been so often repeated, that it may not be inappropriate, in view of the great complexity of the subject, to discuss it on its face value, and point out the necessity of caution in applying it.

An example of a case where this formula could be applied, may be found in *Fargo* v. *Squiers*,[5] where a testator created a trust in personal property for the benefit of his daughter for her life, with a direction that upon her death the property should be

[3]Fargo *v.* Squiers (1897) 154 N. Y. 250, 259; Tweddell *v.* N. Y. Life Ins. Co. (1900) 49 App. Div. 258, 262, aff'd (1901) 166 N. Y. 608.

[4]Maitland *v.* Baldwin (N. Y. 1893) 70 Hun 267, 270; Genet *v.* Hunt (1889) 113 N. Y. 158, 168, 170; Matter of Harbeck (1900) 161 N. Y. 211, 218, 220.

[5](1897) 154 N. Y. 250.

disposed of as she might by her will direct. The daughter by will provided for certain trusts measured by lives of persons not in being at the creation of the power. It was held that the validity of the provisions in the daughter's will, in so far as she was to be deemed to have attempted to execute the power of appointment, must be tested by reading them into the will of her father, and that so tested it would be found that they were void for attempting to postpone the absolute ownership during the lives of persons not in being at the father's death; although in that case the provisions in question were in fact saved by applying them to property not affected by the power.

But now assume this case: A grant to A for life, with alternative dispositions of the entire future estate, one or the other to take effect in full at A's death,[6] as follows,—remainder in such manner and form and to, or for the benefit of, such of A's now living cousins B, C and D, who may survive him, as A, by his last will and testament, may choose to direct, limit and appoint; the exercise or non-exercise of said power, within the limits thus prescribed, to be left absolutely to A's uncontrolled discretion, and the exercise thereof, if any, not to be valid to any extent whatever, unless it shall validly dispose, whether by trust or otherwise, of the entire future estate, and B, C and D, to receive no estate or interest whatever thereunder unless, either as beneficiaries under a valid trust or as direct devisees, they, or some of them, shall thus acquire amongst them the total direct or beneficial interest in the entire future estate; and in case none of said cousins should survive A, or in case, if any do survive, A shall fail to validly execute the power to its full extent, then, and in that event, remainder in fee upon A's death to such persons, living at the death of A, and being his heirs at law, as would be entitled to take the same by descent from him in case the same was land belonging to him situate in the State of New York, and if more than one person then in the proportion in that behalf then prescribed by the laws of the said State; the intent being that at and from the death of A, the entire future estate shall thereupon either be wholly disposed of under the will of A in execution of the power, or else shall then pass wholly to said "heirs," as remaindermen under the deed, but there shall be no combination of the two dispositions so as to have some estate or beneficial interest pass under the power, and the rest pass under the alternative grant to said heirs.

[6]Real Property Law § 51.

The power thus conferred is not such a power as would automatically confer an absolute fee upon A, the life tenant, because it authorized him to dispose of the fee not during his lifetime, but only by his will, and then only in favor of specified individuals, and therefore is not "general and beneficial." [7] His will, therefore, in so far as he may attempt to dispose of the property, must be regarded not as an independent instrument executed by an owner, but as an instrument in execution of a power. The power also is not imperative, because "its execution or non-execution is made expressly to depend on the will of the grantee," [8] and there is a "gift over of the remainder in case the life tenant failed to exercise the power." [9]

Thereafter, A dies, during the life of B, C and D, leaving him surviving two brothers, his only heirs, but leaving a will, by which he undertakes, by way of exercise of the power of appointment, to devise the property to M, and his successors, in trust to receive the rents and profits and apply them to the use of B and C and the survivor of them, so long as either of them shall live, remainder in fee to D and his heirs forever. Aside from the question of the validity of the term of suspension thus created, this being a question here to be considered, the disposition thus effected by the will of A would be authorized under the power.[10]

Before proceeding to apply to the period of suspension thus attempted, the two tests above mentioned, it is first to be noticed that whatever the results of these tests may prove to be, there was as a matter of actual fact, under the two successive instruments, an attempted suspension of the absolute power of alienation for the three lives of A, B and C.

For first, during the life of A, such a suspension existed by virtue of the terms of the original deed itself. Under its provisions, during the life of A, there were no persons in being by whom an absolute fee in possession could be conveyed. The life estate was absolutely alienable, but the future estate was not. The grantor could not revoke the power,[11] and could not absolutely convey the future estate, for he had already parted with his disposing control over it upon each of the alternative contingencies

[7] Real Property Law §§ 134, 136, 152, 153.

[8] Real Property Law § 157.

[9] See Smith *v.* Floyd (1893) 140 N. Y. 337, 343.

[10] Maitland *v.* Baldwin (N. Y. 1893) 70 Hun 267, 270; Crooke *v.* County of Kings (1884) 97 N. Y. 421; Hillen *v.* Iselin (1895) 144 N. Y. 365, 377.

[11] Real Property Law § 148.

of an exercise or a non-exercise of the power;[12] and the possibility that, by the double contingency of a non-exercise of the power and of the entire absence of any heirs of A living at A's death, the future estate might yet prove not to have been disposed of by the deed, would not be such as during A's life to enable the grantor to absolutely alien the future estate, for the double contingency might not occur. The cousins of A could not alien it absolutely, for it might yet happen, through their death before A, or through non-exercise of the power, that they would have no interest in it, and that it might become absolutely vested in A's "heirs," who might be persons other than the cousins. A could not, during his life, alien it, because his power over it was confined to an exercise by his last will.[13] And the persons who, at any given time during A's life, might then be his presumptive heirs, could not alien it absolutely, both because, through exercise of the power, they might never acquire title, and because it could not at any time be said of them that they were certain, even in case of a non-exercise of the power, to be the actual heirs of A at his death, for the persons who were A's presumptive heirs, at any given time, might subsequently and before the death of A be wholly displaced by persons not theretofore in being.[14] And this is true, without regard to whether the estate or interest limited to the heirs of A, in case of non-exercise of the power, was (as would seem true) contingent, or under some possible but apparently unsound application of the famous remarks of Judge Woodruff in *Moore* v. *Littel*,[15] vested subject to defeasance if A should die leaving a will containing a valid appointment, or vested subject to total defeasance by the death of given potential heirs, during the term, or to partial defeasance by the birth of other potential heirs. Even if the future interests could be considered thus defeasibly vested, the very possibility of the defeasance involves the possible coming into being of persons yet unborn, to effect that defeasance, and in the meanwhile, those in whom the remainder was vested (if assumed to be vested at all) subject to being divested, even if they could transfer such interests as they had, for what they might in future prove to be worth, could not transfer the interests of the persons who might yet come into being

[12]Genet *v.* Hunt (1899) 113 N. Y. 158, 169.

[13]*Ibid.*

[14]Cochrane *v.* Schell (1894) 140 N. Y. 516, 539; Dana *v.* Murray (1890) 122 N. Y. 604, 617.

[15](1869) 41 N. Y. 66.

and take as purchasers. It is on this ground that the obvious fact that in *Moore* v. *Littel*[16] there was a suspension during the life estate, does not constitute a just ground of attack upon Judge Woodruff's theory, erroneous in principle though that theory may be for other reasons, that the remainder was defeasibly vested. There is no inconsistency in the two propositions. The suspension in *Moore* v. *Littel* was not caused by the estate which was defeasibly vested, but by the possibility that the vested interest of the existing presumptive heirs might be partially or wholly defeated by new members of the class who might yet come into being, and take on their own account as purchasers.[17]

Many of these same elements of inalienability as applied to the future estate in our assumed case, are found in one view of the facts assumed in *Genet* v. *Hunt*.[18] A difference between the *Genet* case and this, as affecting the applicability of the "reading-in" formula through the fact that the precedent estate was there held in trust, will be pointed out later.

There was then, in fact, in the assumed case, and without regard to the actual provisions of the instrument in execution of the power, a suspension during A's life; and then A's will, being a bare exercise, whether valid or not, of the power conferred by the deed, did in fact attempt to extend this term of suspension by an express trust to continue during two further lives. It is naturally to be assumed, therefore, that any test that might be applied, would, if in itself a correct one, lead to the conclusion that these two instruments between them, the one creating a power, and the other exercising it, did thus operate to effect an illegal suspension.[19] Let us now apply to this state of facts, first the formula as to "reading-in," and then the statutory rule as to merely computing the period of suspension from the time of the creation of the power.

First, then, in applying the "reading-in" formula, we find at once that the process involves not only reading something in, but also reading something out. As the deed actually stood, the alternatives of a testamentary appointment, and a remainder to heirs in default of appointment, could consistently stand side by side. But as soon as we take out of the will and read into the deed, the

[16] *Ibid.*

[17] (1869) 41 N. Y. 66, 77, 81, 83, 85, 86; Cochrane *v.* Schell (1894) 140 N. Y. 516, 539.

[18] (1889) 113 N. Y. 158.

[19] Farmers' Loan & Trust Co. *v.* Kip (1908) 192 N. Y. 266, 274.

direct provision for a vested estate in trust for the benefit of B and C, to take effect in possession at the death of A, with a vested remainder to D in fee, there is no place left for the alternative contingent grant to A's heirs limited to take effect at A's death in case he should die leaving the power unexecuted, for the power itself has necessarily disappeared. Thus after the "reading-in" has been effected, we have a remodelled grant of an estate for the life of A, followed by a vested remainder to trustees for the lives of B and C, followed by a vested remainder in fee to D. Leaving unnoticed for the moment the question of the ultimate disposition of the remainder in fee, we have thus presented a case where there is nothing left to cause any suspension whatever except an express trust which cannot in any event extend beyond the lives of two persons, B and C, in being at the delivery of the deed. The estate to A for life is in itself alienable. If A dies before B and C, the trust and the resulting suspension can only extend through the lives of those two persons; and if they both die before A, the trust and the resulting suspension at once cease.

The scheme of disposition thus arrived at by revising the deed so as to incorporate the provisions of the will, is identical with that presented by the provisions of the instrument considered in *Bailey* v. *Bailey*,[20] where it was held (apart from the actual state of facts as they happened to exist when the instrument became operative), that the provisions would have occasioned a suspension for only two lives in being, and that the life estate, the trust for two lives, and the vested remainder in fee, would all have been valid.

The application of the "reading-in" formula thus results in conjuring up a conclusion that a total scheme created by an instrument conferring a power and an instrument in execution of the power, which together in fact attempted a suspension for three lives, is to be treated as if the suspension could not possibly extend beyond two lives,—a conclusion which does not seem to commend the "reading-in" formula as applied to this particular case.

Still deferring consideration of the possible bearing of the ultimate limitations in fee, and turning now to the statutory rule which tests the validity of the period of suspension occasioned by the provisions of an instrument in execution of a power, merely by computing it "from the time of the creation of the power" (thus

[20](1884) 97 N. Y. 460, 466, 470. Also Corse *v.* Chapman (1897) 153 N. Y. 466, 473.

taking account of the existence and provisions of both the instruments by which the power was created and executed, but not requiring any reading of the provisions of the later instrument into the earlier), and applying it to the assumed case in hand, we find, for the reasons above stated, that the first instrument provides for a suspension for one life, and that the second and subsidiary instrument, in execution of the power, computing from the same date, has in fact attempted a suspension for two other lives, the latter term to begin, if at all, from the end of the first, thus making up a possible invalid term of three lives in being. Looking at the matter as of the date of the creation of the power, we can assume that upon the execution and delivery of the deed, just as it actually stood, in the supposed case, A had forthwith executed his will just as it stood in the supposed case, and having done so, submitted the two instruments to counsel for advice as to the validity of the appointment, in case the will should remain unrevoked at A's death, and B, C and D should then still be living. On that basis it would then clearly appear, from a reading of the two instruments regarded as separate but as destined, upon the happening of the predicated events, to attempt between them a suspension of the power of alienation for three lives in being, that the scheme of the will would be unlawful. And as these events thus predicated were those which thereafter actually occurred, it is apparent that the result of applying the statutory test to the consummated testamentary scheme, is the finding that the term of suspension under the will of A is illegal,—a result the opposite of that reached under the application of the "reading-in" formula.

Thus far we have deferred consideration of the possible bearing, upon the question of whether the results of applying the two formulas are in fact thus opposed to one another, of the dispositions in the deed and will respectively in regard to the ultimate fee. This subject we will now examine. The point of this suggested possibility is, that it might be claimed that those ultimate dispositions could be so treated as to produce an identical result under the application of both formulas. And with this end in view, it might be suggested that in applying the "reading-in" formula, and incorporating into the deed the trust for B and C, it is not necessary to also read in or incorporate the remainder in fee to D and thus expunge the disposition of the fee to the heirs of A; but that on the contrary the taking effect of this latter disposition in interest might be merely postponed to await the expira-

tion of A's life, whether before or after the death of B and C; and that in that case, if A died first, the suspension occasioned by the trust would continue through the lives of B and C, and if they died first, the suspension occasioned by the contingent remainder to A's heirs would continue through the life of A, thus making possible a suspension for three lives.

If this suggestion could be entertained, the result would be that both formulas would alike lead to a common finding, that the term of suspension under the instrument in execution of the power was unduly extended, and thus the accuracy of the "reading-in" formula would be sustained. But this suggestion is not tenable. For it would be hostile to settled doctrines of construction to test the validity of the exercise of a power by looking only at a part of its terms, with the express purpose and result of finding it all invalid, when a recognition of all its parts, assuming the test to be a true one, would result in finding it all valid. And furthermore, the remainder to the heirs was limited to take effect at A's death, if at all, and only in case of non-exercise of the power, and as already seen the application of the "reading-in" formula has necessarily eliminated from the deed all reference to the power. And if, on the other hand, we take into account the fact that, in spite of the "reading-in" process, the power did really exist, and that its exercise in full has actually been attempted, and thus that it might be referred to in connection with the vesting of the remainder limited upon its non-exercise, we immediately find ourselves met by the question, whether the instrument in execution of the power did or did not effect a valid disposition of the entire estate, including both the trust and the remainder to D. If it did, the heirs take nothing, and if it did not, it is all void and the heirs take everything. For under the express terms of the deed, the heirs, at the death of A, were either to take the entire fee, in possession, or they were never to take anything at all; if there was a failure to effect a valid disposition of the entire estate, under the power, they were thereupon to become the absolute owners, but if A should validly execute the power to its full extent, then every beneficial interest, present or future, was to vest either in B, C and D, or some of them, or in trustees, upon a legal trust for their benefit; it was to be one alternative or the other, and in no event was there to be any combination of the two. It is not permissible, therefore, in an effort to ascertain whether the period of suspension under the will is valid, to read only a part of it into the will, and to disregard and

omit the rest and substitute in place of it, with deferred vesting in possession, a disposition which was not to take effect at all unless it should take effect in possession at A's death, as a complete alternative to any vesting in or for the benefit of B, C and D.

If there is to be any "reading-in", therefore, the entire disposition under the will must be read in as a whole into the deed, including an absolute vested remainder in fee to D, thus eliminating the devise to the heirs of A, and creating a term of suspension which must cease by the end of two lives in being at the creation of the estate, and so we are brought back again to the conclusion that the application, in succession, of the two tests, leads to two opposite results, the "reading-in" formula rendering valid as a suspension for two lives only, a scheme carried out by an instrument creating and an instrument executing a power, although in actual operation it did attempt a suspension for three lives, and although the application of the statutory test shows it to be illegal for attempting an undue suspension. Under these circumstances it seems necessary to conclude that the "reading-in" formula, as applied to our assumed case, is incorrect.

The reason for this inapplicability to the facts of the case we have been assuming, of a test which in many cases leads to a correct result, may clearly be seen by comparison with the situation in *Genet* v. *Hunt*,[21] where the facts, as already stated, were in many respects like those of our assumed case. It should be noted in passing that the two lives there selected to measure the term of suspension under the instrument in execution of the power were those of persons not in being at the creation of the power, and this was one of the grounds on which the term of the attempted suspension was held illegal. But the court also held that even apart from that feature, the scheme would have been invalid because measured by three lives, even if those lives had been those of persons in being at the creation of the power.[22] It is from this latter point of view that that case is here of interest. The essential difference which there made it proper to apply the "reading-in" formula, is found in the fact that the life estate under the deed, which preceded the trust for two lives under the will, was itself an estate in trust which operated on its own account to effect a suspension during the life estate. Under those circumstances, the "reading-in", from the later into the earlier instrument, of the trust for two lives, did

[21](1889) 113 N. Y. 158.

[22]*Ibid.* 171.

not, as it did in our assumed case, operate to eliminate from the deed the provisions which effected the suspension during the life estate. In that case, therefore, after the "reading-in" had been accomplished, there was still a suspension which must continue during the life of A, even if she outlived B and C, and must also continue during the lives of B and C even if they both outlived A, and thus must continue through three lives; and this same situation would necessarily be shown by the application of either of the two formulas. In our assumed case, however, the "reading-in" process resulted in eliminating the features which, as the deed actually stood, had occasioned a suspension during the life estate, and thus left no suspension except that effected by the trust for two lives.

The conclusion thus reached, as confined to the particular state of facts assumed, may now be summarized as follows: Where of two instruments, the one creating a power of disposition and the other exercising it, the former by its own terms occasions a suspension for one life and the latter attempts by its own terms to occasion a suspension for two lives, in being at the creation of the power, and the result of incorporating the provisions of the later into the earlier would be to eliminate from consideration the provisions which occasion the suspension under the earlier instrument, the "reading-in" formula is inapplicable.

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